

BRB No. 11-0844 BLA

VIRGINIA R. COMPTON)	
(Widow of JOHNNY COMPTON))	
)	
Claimant-Respondent)	
)	
v.)	
)	
DOMINION COAL CORPORATION)	DATE ISSUED: 08/20/2012
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Order Awarding Survivor's Benefits of William S. Colwell, Associate Chief Administrative Law Judge, United States Department of Labor.

Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Ronald E. Gilbertson (Husch Blackwell LLP), Washington, D.C., for employer.

Paul L. Edenfield (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Awarding Survivor's Benefits (2011-BLA-5811) of Associate Chief Administrative Law Judge William S. Colwell on a claim filed pursuant

to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). This case involves a subsequent survivor's claim filed on September 20, 2010.¹

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Public Law No. 111-148 (2010). The amendments, in pertinent part, revive Section 932(l), which provides that the survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l).

On July 6, 2011, employer filed a Motion for Summary Decision in which it argued that the subsequent survivor's claim is barred pursuant to 20 C.F.R. §725.309(d)(3); that the amendments to Section 932(l), as contained in the PPACA, are invalid; and that the operative date for determining eligibility for survivor's benefits under amended Section 932(l) is the filing date of the miner's claim, which was prior to January 1, 2005. In response, claimant argues that she is entitled to an award of benefits as a matter of law under amended Section 932(l). The Director, Office of Workers' Compensation Programs (the Director), did not file a response to employer's Motion for Summary Decision.

In his Order Awarding Survivor's Benefits, the administrative law judge initially rejected employer's challenges to the applicability of amended Section 932(l) in this subsequent survivor's claim. The administrative law judge then found that claimant satisfied the criteria for derivative entitlement pursuant to amended Section 932(l),² and

¹ Claimant is the widow of the miner, Johnny Compton, who died on July 30, 1994. Director's Exhibit 2. Claimant filed her initial application for benefits on August 23, 1994, which was denied by Administrative Law Judge Mollie Neal. Director's Exhibit 1. By Decision and Order dated September 14, 1999, the Board affirmed Judge Neal's denial of benefits. *Compton v. Dominion Coal Corp.*, BRB No. 98-1288 BLA (Sept. 14, 1999)(unpub.); Director's Exhibit 1.

² The miner was receiving federal black lung benefits at the time of his death pursuant to a claim filed on May 13, 1985, which was awarded by Administrative Law Judge John H. Bedford on July 3, 1989. Director's Exhibit 1. In a Decision and Order issued on August 24, 1992, the Board affirmed Judge Bedford's award of benefits. *Compton v. Dominion Coal Corp.*, BRB No. 89-2525 BLA (Aug. 24, 1992)(unpub.).

awarded benefits to commence as of October 1999, the month after the month in which the prior survivor's claim was denied.

On appeal, employer challenges the constitutionality of amended Section 932(l), and its application to this subsequent survivor's claim. Employer argues that the subsequent claim is barred by the principles of res judicata, or claim preclusion, and 20 C.F.R. §725.309(d)(3). Employer further argues that retroactive application of the amendments violates its due process rights; and that the operative date for determining eligibility for survivor's benefits under amended Section 932(l) is the date that the miner's claim was filed, not the date that the survivor's claim was filed. Lastly, employer argues that the onset date for commencement of benefits cannot pre-date the PPACA. Claimant and the Director respond, arguing that amended Section 932(l) is applicable to this subsequent survivor's claim and that the administrative law judge properly awarded benefits. The Director, however, argues that, contrary to the administrative law judge's finding, benefits should commence in December 1999, the month after the month in which the prior denial became final. Employer has also filed a reply brief, reiterating its argument that this subsequent survivor's claim is barred.³

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.⁴ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

³ Employer further states that, if the award is not reversed, then it should be held in abeyance "pending final rulings on the issues at the circuit court level and the [United States] Supreme Court." Employer's Reply Brief at 2 n.1. Subsequent to the briefing in this case, the United States Supreme Court upheld the constitutionality of the Patient Protection and Affordable Care Act, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427810 (June 28, 2012), and the United States Court of Appeals for the Fourth Circuit affirmed the Board's decision in *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *petition for cert. filed*, U.S.L.W. (U.S. May 4, 2012)(No. 11-1342), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010). Employer's argument is, therefore, rejected.

⁴ As the miner was last employed in the coal mining industry in Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 1.

As an initial matter, we reject employer's contention that retroactive application of the automatic entitlement provisions of amended Section 932(l) to claims filed after January 1, 2005, constitutes a due process violation, for the same reasons the Board rejected substantially similar arguments in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (Order)(unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011); *see also B&G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 25 BLR 2-16 (3d Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). Further, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has affirmed the Board's holding that the operative date for determining eligibility for survivor's benefits under amended Section 932(l) is the date that the survivor's claim was filed, not the date that the miner's claim was filed. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2, 25 BLR 2-65, 2-74 n.2 (4th Cir. 2011), *petition for cert. filed*, U.S.L.W. (U.S. May 4, 2012)(No. 11-1342), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010). For the reasons set forth by the Board in *Stacy*, we hold that employer's arguments to the contrary are without merit.

Employer further contends that, because claimant's prior claim for survivor's benefits was denied and the denial became final, fundamental principles of res judicata, or claim preclusion, set forth in 20 C.F.R. §725.309(d)(3), bar her subsequent claim. We disagree. The principles of res judicata addressed in Section 725.309, requiring that a subsequent claim be denied unless a change in an applicable condition of entitlement is established, are not implicated in the context of a survivor's subsequent claim filed within the time limitations set forth under Section 1556 of Public Law No. 111-148, because entitlement thereunder is not tied to relitigation of the prior finding that the miner's death was not due to pneumoconiosis. *Richards v. Union Carbide Corp.*, BLR , BRB Nos. 11-0414 BLA & 11-0414 BLA-A, slip op. at 4-6 (Jan. 9, 2012)(en banc)(McGranery, J., concurring and dissenting)(Boggs, J., dissenting), *appeal docketed*, No. 12-1294 (4th Cir. Mar. 8, 2012). Therefore, contrary to employer's contention, the automatic entitlement provisions of amended Section 932(l) are available to an eligible survivor who files a subsequent claim within the time limitations established in Section 1556 of the PPACA. *Id.*

Because claimant filed her subsequent survivor's claim after January 1, 2005, her claim was pending after March 23, 2010, and the miner was receiving benefits under a final award at the time of his death, we affirm the administrative law judge's finding that claimant is entitled to receive survivor's benefits pursuant to Section 932(l), 30 U.S.C. §932(l). Director's Exhibits 1-3.

Finally, employer contends that the administrative law judge erred in relying on 20 C.F.R. §725.309(d)(5) in setting the date from which benefits commence. Employer states that, assuming *arguendo* that an award is possible, benefits cannot commence prior

to the effective date of the PPACA. The Director, however, argues that the administrative law judge properly relied on Section 725.309(d)(5) in determining the onset date, but erred in calculating the benefits commencement date as October 1999. Noting that benefits on a subsequent claim may not commence until the month after the month in which the prior denial became final, *see* 20 C.F.R. §725.309(d)(5), the Director argues that claimant is entitled to benefits commencing in December 1999, rather than in October 1999. The Board recently adopted the Director's position, holding that benefits are payable in a subsequent survivor's claim filed within the time limitations set forth in Section 1556 from the month after the month in which the denial of the prior claim became final. *Richards*, slip op. at 7. Here, the decision of the Board affirming the denial of claimant's prior claim became final on November 14, 1999, which is 60 days after the decision was issued on September 14, 1999. *See Youghioghney & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 951-53, 22 BLR 2-46, 2-60-64 (6th Cir. 1999). Consequently, we modify the administrative law judge's determination of the commencement date for benefits to December 1999. *See* 20 C.F.R. §725.309(d)(5).

Accordingly, the administrative law judge's Order Awarding Survivor's Benefits is affirmed, as modified to reflect December 1999 as the date from which benefits commence.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge